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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1969

No. 624

RAY SMITH TRANSPORT COMPANY,
Petitioner

vs.

GEORGE P. SHULTZ, SECRETARY OF LABOR
(Formerly W. WILLARD WIRTZ,
SECRETARY OF LABOR, D.C. CA-4645)
UNITED STATES DEPARTMENT OF LABOR,
Respondent

Petition for Writ of Certiorari to the United States Court of Appeals, Fifth Circuit

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I. THE PETITION

Ray Smith Transport Company, Petitioner herein, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals, Fifth Circuit, entered by said Court on 28 March 1969, with petition for rehearing denied 15 July 1969.

II. CITATION TO OPINIONS BELOW

The opinion of the trial court is reported at 280 Fed.Supp. 54 (E.D. Tex. 1968).

The opinion of the United States Court of Appeals, Fifth Circuit, is reported at 409 Fed.2d 954.

The petition for rehearing and motion for rehearing en banc was denied without comment on 15 July 1969.

Certified copy of the judgment of the Court of Appeals was mailed to the Clerk of the trial court on 24 July 1969.

III. JURISDICTION

Jurisdiction of this Court is invoked under *28 U.S.C. 1254 (1)* and the considerations governing review on certiorari set out in Rule 19 of the Rules of the Supreme Court, especially in that the lower court has (1) decided an important question of federal law which has not been, but should be, settled by this Court; (2) the decision is in conflict with decisions of this Court; (3) has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

IV. QUESTIONS PRESENTED

1. Does the holding of the Fifth Court of Appeals in this case, erroneously and contrary to the intent of Congress, extend coverage of the Act, *29 U.S.C. 201*, et seq., to a third catagory of employees, i.e., those employees of another (such as defendant's employees here) who perform no work which contributes to the placing of *goods* into the *channels* of interstate commerce

2. The error of the Fifth Court of Appeals in its complete departure from the plaintiff's pleadings and the theory upon which the case was tried, both affirmatively and defensively, and said Court's rendition of judgment on a new and different theory of its own,

said Court has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Honorable Court's power of supervision.

3. Under facts found by the trial court, the decision of the Fifth Court of Appeals is in direct conflict with the employee work test rule announced by this Honorable Court in *Kirschbaum vs. Walling*, 316 U.S. 517, i.e., that the work of the employee must have such a close and immediate tie with the process of production for commerce as to be essentially a part of it, which holding is now cemented into the fabric of the Fair Labor Standards Act by the 1949 Amendment of Section 203(j) of the Act by the words "*closely related process or occupation directly essential to the production*" *of goods.*

4. Is the mere driving of a truck, for a local exclusively intrastate motor common carrier in the transportation of a completely finished product (goods), from a point in Texas to another point in Texas, and delivery to (a) *an instrumentality of commerce* or (b) to contractors doing work on an instrumentality of commerce, engaged in the production of "goods" for commerce; especially (1) where the trial court found as a fact that defendant-appellant's employees "had nothing to do with the actual production of the goods (R. 105); (2) said goods *never* became a part or ingredient of such instrumentality; and (3) in spite of the fact that, although "produced," as defined in Section 3(j) of the Act uses the word "transporting," the use of such word (and others) is

immediately limited and qualified by the words "in any *closely related process or occupation directly essential* to the production thereof," i.e., goods.

5. Does the opinion of the Fifth Court of Appeals in this case do violence to, in fact emasculate, the 1949 Amendment to the Act which dealt primarily with Section 203(j) when Congress inserted "closely related" preceding the word "process" and substituted "directly essential" for the word "necessary" following the word "occupation"?

6. The decision of the Fifth Court of Appeals is in conflict with *Thomas vs. Hempt Bros.*, 345 U.S. 19; *Alstate Construction Co. vs. Durkin*, 345 U.S. 13; *Wirtz vs. Intravaia*, 375 Fed.2d 62, cert. den. 389 U.S. 844; in that in each of those cases the defendant produced "goods' which were hauled to instrumentalities of commerce, which goods became a part or ingredient of the involved instrumentality, facts directly contrary to the facts here, thus requiring a contrary result.

V. FEDERAL STATUTE INVOLVED

The Fair Labor Standards Act, *29 U.S.C. 201*, et seq.

VI. THE PLEADINGS AND ISSUES

This suit was brought to enjoin defendant from alleged violations of Sections 15(a)(2) and 15(a)(5) of the Fair Labor Standards Act. *29 U.S.C.A. 201*, et seq.

The parties will be referred to as they were in the

trial court. The defendant perfected appeal to the Fifth Court of Appeals of the United States and is the petitioner here.

The plaintiff, Secretary of Labor, United States Department of Labor, alleged only that defendant's employees were "engaged in the production of goods *for* commerce." There is no allegation that said employees were engaged *in* commerce and plaintiff at no time made any such claim.

The contested issue of fact was: "(c) Whether defendant's said employees were regularly engaged in the production of goods *for* interstate commerce or in processes or occupations *closely related* or *directly essential* thereto." R. 97.

The complaint in the trial court contained no allegation that defendant's employees were engaged in interstate commerce.

The contested issue of law was "(a) Whether defendant's employees were engaged in the production of goods *for* interstate commerce within the meaning of the Act." R. 98.

Plaintiff's alleged grounds or basis for recovery, Complaint ¶ IV, R. 16-17, were that because defendant's employees "are regularly engaged in the transportation and delivery of gasoline, kerosene and diesel fuel to East Texas Motor Freight" (Lines), R. 16-17, and *other instrumentalities* of commerce, etc., that defendant's "employees were engaged in the production of goods *for* interstate commerce within the meaning of the Act" R. 17. Especially note that the

words "engaged in interstate commerce and" were stricken from the pleading and initialed by the trial attorney "T.E.B.," and see trial attorney's signature at R. 20. Order authorizing at R. 96.

The list of what may be properly called consignees to whom deliveries of the mentioned commodities were made, such as East Texas Motor Freight, was subsequently greatly expanded, but the basic allegations as ground for recovery were not enlarged by amendment of the complaint or otherwise.

Absent from the complaint is any allegation (also proof) that defendant's employees were engaged in the production of the goods, i.e., gasoline, kerosene and diesel fuel, which said employees transported. And the trial court found as a fact that these drivers had nothing to do with the production of said goods. R. 105.

Yet strange to say, that is the ground, and only ground, for the Fifth Court of Appeal's holding that defendant's drivers were engaged in the production of goods for interstate commerce. 409 Fed.2d at p. 955.

But by allegation and attempted proof the plaintiff-Secretary relied *solely* upon the *use* made by the consignees of the gasoline, kerosene and diesel fuel *after* delivery thereof to said consignees, being instrumentalities of commerce.

VII. FACTS OF THE CASE

The material facts of this case are plain, simple, few, and stipulated. They are that:

1. Defendant is a common carrier by motor vehicle

operating exclusively within the State of Texas subject to the jurisdiction of and regulated by the Railroad Commission of Texas, hence an independent enterprise;

2. Defendant's employees had nothing to do with the production of the goods transported by defendant's trucks of which the employees were the drivers. R. 105;

3. Defendant is an exclusively intrastate motor common carrier, operating exclusively within the State of Texas, and its employees had nothing to do with the production of gasoline, kerosene and diesel fuel, as the trial court found, the sole function of the defendant being that of transportation;

4. All goods transported by defendant (and its drivers) were completely processed and finished goods with nothing left to be done to them, i.e., processing of any kind, at the time they were received for transportation, *and nothing was done to them;*

5. These goods had no prior or subsequent movement in interstate commerce, as defined in Section 3(b) of the Fair Labor Standards Act;

6. The plaintiff did not even attempt to establish by evidence that these commodities were produced, or even intended, for interstate commerce;

7. Defendant's employees delivered the goods, gasoline, kerosene and diesel fuel, from a point in Texas to another point in Texas—no state line being crossed;

8. They were delivered *for and to* four major oil companies who were both the consignor and consignee;

9. Almost all deliveries were made to the major oil companies' bulk stations and retail filling stations, all in Texas; R. 104, trial court's finding. Defendant had nothing to do with deliveries from the oil companies' own bulk stations to their retail filling stations;

10. The remaining deliveries were made primarily to instrumentalities of commerce such as motor carriers and to contractors engaged in construction or repairs of instrumentalities of commerce such as highways, railroads and dams;

11. The goods so delivered did not become a "part or ingredient" of any such instrumentalities.

12. As to six manufacturers to whom a few deliveries were made, it was stipulated as to four of them that the fuels (gasoline, kerosene and diesel oil) were used *only after* all production processes were complete, and as to the other two that said fuels did not become a part or ingredient of goods; hence there was a complete failure of proof that defendant's employees were engaged in any closely related *process* or *occupation directly essential* to production of goods.

VIII. COMMENTS RELATING TO PROOF OR LACK OF IT

There is a complete failure of proof (1) that any of said commodities whatsoever, after delivery, ever became *a part or ingredient* of "goods" *or of an instrumentality* of commerce; (2) that any of said commodities ever entered the stream of commerce as defined in Section 3(b), *29 U.S.C. 203(b);* and (3) that

any of defendant's employee-drivers "in any manner" worked on "goods" of any kind "or in any *closely related process* or *occupation directly essential to production*" thereof.

This Court judicially knows that instrumentalities of commerce are not producers of goods, hence the *use* to which the gasoline, kerosene and diesel fuel was put becomes immaterial.

It was stipulated with reference to fact No. 7 as set out above that: "(S)ome unsegregated portions" of the fuels delivered to bulk stations and retail service stations were sold from filling stations "to trucks and other vehicles engaged in the transportation of goods and persons to and from places outside the State of Texas." R. 92-93.

This stipulation amounts to no more than the fact of delivery of the commodities to specific instrumentalities of commerce and by such instrumentalities *consumed*. True that some were consumed *in* interstate transportation, *but defendant's employees are not alleged to be engaged in interstate commerce.* They are alleged to be engaged in the production of goods *for* commerce *and no more.*

The last phrase of the definition of "goods" (Sec. 3[i]) "but *does not include* goods after their delivery into the actual physical possession of the *ultimate consumer* thereof *other than a producer, manufacturer* or *processor thereof*"; and the last phrase of the definition of produced (Sec. 3[j]) "or in any closely related process or occupation directly essential to

the production thereof," (emphasis supplied), clearly and completely deny the application of the Act to defendant's employees and the right of the plaintiff-Secretary to recover.

IX. DISCUSSION OF QUESTIONS PRESENTED

The first two questions presented are the vital questions. They are questions not heretofore determined by this Honorable Court and are of such importance as to require determination by this Court. The first is as follows:

> 1. Does the holding of the Fifth Court of Appeals in this case, erroneously and contrary to the intent of Congress, extend coverage of the Act, *29 U.S.C. 201*, et seq., to a third catagory of employees, i.e., those employees of another (such as defendant's employees here) who perform no work which contributes to the placing of *goods* into the *channels* of interstate commerce?

Prefatory to the discussion of this question, be it remembered that the defendant "had nothing to do with the actual production of these goods," R. 105; that "(T)he record shows that *practically all* of the transportation service performed by the defendant had been . . . for Texaco, Inc., the Humble Oil and Refining Company, the Gulf Oil Company, and the Skelly Oil Company;" that *almost all* of the petroleum products were picked up at the Premier Oil Refinery, Longview, *Texas*, the La Gloria Oil Refinery, Tyler,

Texas, the American Petroleum Refinery, Mt. Pleasant, *Texas*, the Texaco Oil Pipeline Terminals, Waskom and Center, *Texas*, or the Gulf Oil Corporation Terminal, Big Sandy, *Texas*. R. 104.

Remember also that it was "stipulated, that none of the petroleum products transported by defendant subsequent to July 1, 1964, have had a prior movement in interstate commerce . . .," and the trial court so found, R. 105; that the products were picked up at the Texas points mentioned above and were "delivered by the defendant directly *to the establishments of the above mentioned four* major oil companies . . . ," etc., R. 104, 105, all located in Texas as shown in catagory (c) of the stipulation. R. 85 and R. 106, trial court's finding.

There was no stipulation, as the trial court found, R. 106, that the involved commodities were *used* "in process of manufacturing goods for interstate distribution," R. 106, although the "use" was stipulated as to six manufacturers, which shows that at least as to four of these that it was used *in their own trucks after* all production processes were completed. And in any event, as to all of them the said petroleum products *never became a part or ingredient* of any other "goods," Section 3(i), nor was there any undertaking to prove, and it was not established by proof, and it cannot be assumed, that the work in which defendant's employees were "engaged" was in any "closely related process or occupation directly essential to the production thereof." Section 3(j).

The evidence in this case conformed to plaintiff-

Secretary's theory of the case as demonstrated by his pleadings, all as heretofore pointed out. As so limited, the decision of the Fifth Court of Appeals must stand or fall upon the question of whether deliveries of goods to *instrumentalities* of commerce but which did not become a part or ingredient of *such* instrumentalities create a third catagory of employees who are covered by the Act, contrary to the plain intent of Congress.[1]

This is true in spite of the fact that the trial court found that "Much of the refined petroleum products that defendant transported . . . ended up in interstate commerce." R. 108.

That finding is clearly contrary to the trial court's finding that "*almost all* of the petroleum products were picked up," R. 104, at points in Texas and delivered to the bulk stations and filling stations, all in Texas, of four major oil companies, from which "some unsegregated part (R 106) . . . was regularly sold . . . for use in *trucks and other motor vehicles* engaged in the transportation of goods and persons to and from places outside the State of Texas." R. 107. The finding is a positive denial that the involved petroleum products ever entered the stream of commerce.

Trucks and other motor vehicles are instrumentalities of commerce.

Thus the record is clear that "practically all of the transportation service performed by defendant," R. 104, has been first, to bulk stations and filling sta-

[1]Of course, the decision of the Court of Appeals must fall anyway because it is without pleading and proof to support it.

tions, from thence and at some later date, some of it got into the fuel tanks of facilities for commerce.

Remember, however, that plaintiff did not plead that defendant or its employees were engaged in interstate commerce. This was deliberate. The case apparently was deliberately designed as an undertaking to extend coverage of the Act to a third catagory of employees.

Congress did not so intend. Congress' limitation of coverage to those engaged (1) "*in* commerce," and (2) "in the production of goods *for* commerce" makes it clear that Congress did not intend to include another catagory of employee, i.e., those merely serving instrumentalities, for if there had been any such intent Congress could have easily said so. But it did not. This was also deliberate. For this Honorable Court said in *Kirschbaum's* case:[2]

> "Federal legislation of this character cannot, therefore, be construed without regard to the implications of our dual system of government . . . (P. 520).
>
> "We cannot, therefore, indulge in loose assumption that when Congress adopts a new scheme for federal industrial regulation, it thereby deals with all situations falling within the general mischief which gave rise to the legislation . . . (P. 521).
>
> "Congress may choose, as it has chosen frequently in the past, to regulate only part of what it constitutionally can regulate, leaving to the States activities which, if isolated, are only local,

[2]316 U.S. 517.

we need refer only to the history of Congressional control . . ." etc. (P. 521).

"Since the scope of the Act is not coextensive with the limits of the power of Congress over commerce, *the question* remains whether these employees fall within the statutory definition of employees 'engaged *in* commerce or in the production of goods *for* commerce.' . . ." (P. 523). (Emphasis ours).

We have emphasized "the question" for, eliminating the question of "engaged in commerce"—not plead, it is the *exact question here.*

Remembering, especially, that in this case the plaintiff-secretary *did not even allege* that the employees here, or their employer-defendant, are engaged in (interstate) commerce, the question for the Court is pinpointed and emphasized.

We believe that the question as here isolated has not been passed upon by this Honorable Court since the 1949 Amendment. This amendment confirmed the approach and decision of this Court in *Western Union Telegraph Co. vs. Lenroot*, 323 U.S. 490, 503-504.

The importance of the question is further emphasized by two facts as follows:

First: The trial court, admitting that defendant's employees "had nothing to do with the actual production of the good," R. 105,[3] wholly fails to relate their transportation to "production of goods *for* commerce," the case plead by plaintiff, but proceeds to relate their

[3] 280 Fed.Supp. 54.

transportation *to "commerce" only*, a case not plead by plaintiff.

Second: That such relation *is limited "to commerce" only* is clearly indicated by the trial court's holding that, (a) "in our case here the employees were providing an *important service* to those *involved in interstate commerce*," and then further holding that, "the *important service is the delivery of fuel* which enables these people to carry on their interstate activities." R. 110, 280 Fed.Supp. at p. 57. This is a far cry from production of goods for commerce.

But the Court here *must* relate the activities of the employees to the "production of goods," *for that is the only case alleged* and the only kind of case that plaintiff undertook to make.

Then the case reached the Fifth Court of Appeals. That court, obviously dissatisfied with the treatment of the case by the trial court, set sail on its own, without reference to the pleadings and the facts found by the trial court, and held that defendant's employees *were engaged in the production of the goods they transported*, i.e., gasoline, kerosene and diesel fuel. That is made clear by the Court of Appeals when it says:

> "In determining whether the appellant's drivers engaged in the production of goods for commerce, we must deal with two inquiries: (1) *whether the drivers engaged in the production of the petroleum products they transported;* and (2) whether the petroleum products were produced for commerce." 409 Fed.2d 954, at p. 955.

This is where the Court of Appeals lost its guide and compass.

This is (1) a complete switch from the trial court's thesis and (2) an utter departure from the theory and allegations of plaintiff's petition.

There should certainly be a firming up of this fluid conglomerate. Plaintiff's theory as alleged vs. trial court's thesis vs. Court of Appeals' departure from both plaintiff's theory and trial court's thesis.

Surely there can be no doubt about the literal fact that the Fifth Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Honorable Court's power of supervision.

Quite frankly and candidly, but with respect, humility and apology, this kind of hop, skip and jump procedure is shocking to your undersigned counsel.[4]

Under the facts of this case, should we not recall that this Court warned in *Kirschbaum's* case, supra, that cases such as this cannot be determined "without regard to the implications of our duel system of government." And this Court said that: "Congress may choose, as it has chosen frequently in the past, to regulate only a part of what it constitutionally can regulate, leaving to the States activities which, if isolated, *are only local.*"

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[4] For now more than 47 years the writer hereof has labored under the impression that the purpose of pleadings requires that allegata and probata must correspond. The appellate court here cut both the allegata and the probata from the whole cloth.

Obviously when Congress chose to regulate interstate commerce, as Congress defined it in Sec. 3(b)[5] of the Act, and then to regulate "the production of goods *for* commerce" in the defined statutory sense, it obviously chose not to regulate *mere service* to instrumentalities of commerce, especially when the "services" if *isolaled*, as they clearly are here, "are only local." Of course, "service" to instrumentalities of commerce might *affect* commerce, but by application of a common sense judgment and legal principles set out in the cases, Congress did not go so far. Congress tried to nail down the intended limitations in its definitions of "commerce," Sec. 3(b), of goods, Sec. 3(i), and of production of goods, Sec. 3(j).

But the trial court dodged legally and the appellate court ducked factually and legally, in disregard of plaintiff's pleading and theory of the case.

Both courts below rely on much the same case authority. Let us examine them. This is somewhat difficult because of the varying bases assigned by the courts below in support of the results reached.

The trial court cites *Kirschbaum vs. Walling*, 316 U.S. 517. But *Kirschbaum's* case was determined based upon the substantiality in kind of the work done. And that is, as in all cases it must be, dependent upon the activities of the employees. In *Kirschbaum* it was held that the activities of the involved employees were substantially the same as they would be if they were employed by the manufacturers occupying the building. But here, both courts below, the

[5] Its historical meaning.

Court of Appeals not even trying, failed factually to relate the *activities* of defendant's employees to production of goods—*the sole case alleged.*

Each court, trial and appellate, cites and relies on *Alstate Construction Co. vs. Durkin*, 345 U.S. 13, and the appellate court also cites *Thomas vs. Hempt Bros.*, 345 U.S. 19. Such reliance is clearly misplaced. When we examine *Alstate Construction Co.'s* case, supra, we also dispose of *Hempt Bros.*, supra.

The decision of the Fifth Court of Appeals fails to explore the factual depths of these two decisions. The facts relating to the activities of employees are the significant and determining factor, as *Kirschbaum*, supra, teaches us.

This Court tells us in *Alstate* that:

> "The question presented in this case is *whether* employees who work off such roads *in the production of materials to repair them* are engaged in the production of goods for commerce." (Emphasis ours): 345 U.S. at p. 14.

That is the way *Alstate* was presented to this Court by Solicitor General Cummings, et al. The contention of the Solicitor is summed up as shown at 345 U.S. 13, 97 L.Ed. 746-747, as follows:

> "Since it is well established by the decisions of this Court that the maintenance and repair of instrumentalities of commerce is so intimately related to *interstate commerce* as to be in practice and legal contemplation a part of it (citing cases), the *production of materials for use in the repair* of, and *which become A PART OF SUCH*

INSTRUMENTALITIES is production of goods for commerce." (Emphasis ours).

The summary continues:

"*Materials* produced *specifically* for use in the repair and maintenance of, *and which become part of interstate instrumentalities* are produced 'for' commerce." (Emphasis our).

This Honorable Court sustained this contention and we have no quarrel with it. But we do justifiably have a "crow to pick" with the appellate court here for its superficial consideration of the facts in *Alstate*, *Hempt Bros.*, and *here.*

The "*materials*" here were not produced *specifically* for use in "*repair and maintenance* of" nor did they "*become part of the instrumentalities.*"

This Court's opinion, 345 U.S. 13 at p. 14, says that Alstate "also manufactures at three Pennsylvania plants a bitumuous road surfacing mixture . . ." This is important. The off-the-road employees were producing *materials* which became *a part* of the instrumentality of commerce. Hence, those employees of Alstate producing materials were producing them "*in*" commerce but not "*for*" commerce.

Statutory definitions, together with the provisions of Secs. 6 and 7, *29 U.S.C. 206 and 207*, make this clear and obvious. The prohibition of Section 7(a) is that:

". . . no employer shall employ any of his employees who in any work week is engaged *in* com-

merce *or* in the production of goods *for* commerce . . ."

This is two clear, separate and specific catagories of covered employees. This Court has so held.[6]

It is equally clear that here, under the facts and the pleadings, that defendant's employees are not covered.

"Commerce" is defined in the Act, Sec. 3(b), and plainly means and is intended to mean transmission or movement of articles of trade or barter between the states. In other words, movement from a point within a state to a point outside thereof.

The coverage established by the "production of goods *for* commerce" test extends *only* to those employee activities which are intended to and do contribute to *placing goods into the stream of commerce*, movement across state lines.

Here it should never be forgotten that plaintiff bottomed his case solely upon "production of goods for commerce," not at any time alleging that the defendant's employees were engaged in commerce, or in any closely related process or occupation *directly essential* to the production of goods for commerce.

Thomas vs. Hempt Bros., supra, presents the same

[6] *McLeod vs. Threlkeld*, 319 U.S. 491, 497: The test ". . . to determine whether an employee is engaged in commerce, is not whether the employee's activities affect or indirectly relate to interstate commerce but whether they are actually in or so closely related to the movement of the commerce as to be a part of it. Employee activities outside of this movement, so far as they are covered by wage-hour regulation, *are governed by the other phrase, 'production of goods for commerce.'*" (emphasis ours)

factual situation as *Alstate*. The opinion in *Alstate* near the end of the opening paragraph says:

> "The complaint alleged these facts: Hempt Brothers *operate a stone quarry* in Pennsylvania, *use* the stone in *manufacturing cement mixtures*, and then haul these mixtures in trucks to customers"

who *used the concrete for repair and maintenance* of roadbeds, etc. The concrete mixtures *became a part of the instrumentalities*. We need not comment on this case further.[7]

There are many such cases all based upon similar facts. But the facts here are wholly unlike those facts. For here defendant's employees had nothing to do with production of the "materials" (goods) carried by them. Moreover, the materials did not become a part of an instrumentality of commerce.[7]

"*In* commerce" and production of "goods *for* commerce," by definition, are *two* clearly distinct things. "In" and "for" in the context of the definitions clearly disclose the distinction and the intent of Congress. To loosely assume otherwise is not only to ignore the intent of Congress but is to violate every principle of logic. For neither statutorily nor logically can instrumentalities of commerce be warped into meaning goods. A contrary contention is mere sophistry.

[7] Other cases cited by the appellate court with similar facts and holdings, hence of no relevance, are: *Wirtz vs. Intravaia*, 375 Fed.2d 62, cert. den. 389 U.S. 844; *Mitchell vs. Hooper Equipment Co.*, 279 Fed.2d 893; and *Wirtz vs. Crystal Lake Crushed Stone Co.*, 327 Fed.2d 455. In each instance the defendant was producing goods *which became a part* of the instrumentality, as they did in *Alstate* and *Hempt Bros.*

This is not to question *Alstate* and *Hempt Brothers*, supra, but it is to insist that cases be determined within the context of the statute, the pleadings, and the particular facts of each case.

The important and significant fact here is that defendant's employees are not alleged to be "engaged *in* commerce"—interstate commerce, of course. As often said herein, it is only charged (alleged) that defendant's employees are "engaged *in* the production of goods *for* commerce"—interstate commerce, of course. Use of the word "in" in the first clause and the word "for" in the second clause is highly significant and clearly points up the separation of functions and their distinct separate meaning.

Plaintiff does not even try to relate the activities of defendant's employees to the production of goods *for* commerce, the controlling factor, but does undertake to relate such activities to *service* (not activities relating to production of goods) to instrumentalities of commerce.

The big trouble is that in many cases the questions of whether an employee was engaged "in commerce" or whether he was "engaged in the production of goods for commerce" have been treated by the courts as a single question. In other cases the two questions were treated separately. The courts have thus wound themselves up in a big ball of wax of conflicting decisions because of their failure at times to recognize that there are two separate and distinct questions and the significant distinction between the use of "*in*" in the one instance and "*for*" in the other. They have decided

cases in something of a vacuum as though interstate commerce was not defined in the Act; as though "goods" was not defined; and as though "produced" as defined is not circumscribed within the limitations of the definitions of "commerce" and of "goods."

But "commerce" is defined. It is defined in terms of movement, transmission, etc., i.e., among the several states or between any state and any place outside thereof. Sec. 3(b). So when we speak of production of goods *for* commerce, we are speaking of "goods" that are produced for movement and are intended to be moved across state lines—i.e., from a point in one state to a point in another.

That seems so plain and simple that we wonder why all the debate. Why not accept it just like Congress defined it.

Now "goods" is defined in terms of "articles or objects of commerce" that may in the definition of commerce be *moved, transported, transmitted* from state to state, i.e., *between* any state and any place outside thereof.

There is nothing complicated about that. We cannot understand why so much litigation has developed, nor why there have been so many theories advanced by courts as to the Congressional intent. The intent seems to be perfectly clear.

Congress expressed no intention of regulating instrumentalities of commerce, nor of employees serving them. This phase was left to the States, except to the extent that instrumentalities are otherwise regulated,

both on the national and state level as illustrated by the Interstate Commerce Act in all four of its parts, safety and rates, as well as other Acts.

Anyway, the intelligentsia of the scientific and engineering arts have never been able to square a circle. No more can the courts, other than by judicial fiat, convert *instrumentalities* of commerce *into goods as goods are defined* in Sec. 3(i) of the Act. They are poles apart.

In any event, omission by Congress of any reference to serving instrumentalities of commerce confirms its intent to leave such regulation, with the exceptions noted, to regulation by the States. Of course, this does not exclude employees who because of the nature of their activities are engaged *in commerce.*[8] *But here there is no allegation that defendant's employees are engaged in interstate commerce.*

When the pleadings and the facts of the case here are compared with the pleadings and the facts of *Kirschbaum, Alstate* and *Hempt Brothers,* supra, and *Walling vs. Jacksonville Paper Co.,* 317 U.S. 564, and others, it clearly appears that the decision of the Fifth Court of Appeals in this case is plainly in conflict with the decisions of this Court.

[8]The decision of the Fifth Court of Appeals is, based upon the pleadings and the facts of this case, in direct conflict with *Overstreet vs. North Shore Corp.* (1943), 318 U.S. 125; *Mitchell vs. C. W. Vollmer & Co.* (1955), 349 U.S. 427; *Fitzgerald Construction Co. vs. Pedersen* (1945), 324 U.S. 720, in each of which cases the Supreme Court held that the involved employees were covered by the Act because they were engaged in maintenance and repair of interstate facilities (instrumentalities) for interstate commerce; that the test is whether the work is so directly and vitally related to the functioning of instrumentalities of interstate commerce as to be in practical effect a part of it.

We also verily believe the decision here, under the facts here, to be in direct conflict with the decision of this Court in *Powell vs. United States Cartridge Co.*, 339 U.S. 497, 513-14, from which we quote:

> "We believe that the crucial fact which establishes the coverage of the Act is the status of the munitions, as 'goods', *during the time they were being produced.* The literal meaning of the exclusionary clause in § 3(i), and that which best serves the purposes of the Act, is merely that, *after the products shall have been delivered into the actual physical possession of their ultimate consumer, they then shall cease to be 'goods.' This retains the important effect that, thereafter, it is not a violation of § 15(a) (1) for the ultimate consumer to transport the products outside of the state.* This interpretation was adopted by the Wage and Hour Administrator. 1940 WH Man. 131, 133. It was readopted without change in the July, 1947, revision of the Administrator's Interpretations. 12 Fed.Reg. 4585,29 CFR § 776.7 (h)." (Emphasis ours).

The decision here is also in conflict with *Wilson vs. Reconstruction Finance Corporation*, 158 Fed.2d 564 (5th C.A.), cert. den. 331 U.S. 810, where the Court said:

> "The independence of the employer of the plaintiffs and the employers of the housing occupants *insulates* the plaintiffs from the status of producers of goods for commerce."

At this point we should as well notice *Warren-Bradshaw Drilling Co. vs. Hall*, 317 U.S. 88 (1942), as did the Court of Appeals. But this case goes so

much further than *Kirschbaum's* case, supra, that it could be argued that the two cases are in conflict. *Kirschbaum* gave us the substantiality of kind of work rule, but *Warren-Bradshaw's* case, supra, goes far beyond that. In any event, the employees in *Warren-Bradshaw Drilling Co.'s* case were members of a drilling crew and that is a vastly different situation from that here present. And that was prior to the 1949 Amendment. In the making of a practical and reasonable judgment, it cannot be said that what the defendant's employees did here was in any respect substantially the same kind of work or even closely approaching it.

Here the appellate court admits the conflicts and pleads an avoidance, saying: "Likewise, the decisions of *this court have adopted a more liberal construction of production* than that urged by appellant," (emphasis ours), and cites *Wirtz vs. Standard Container & Paper Co.*, 389 Fed.2d 134 (5th Cir.). The attempted avoidance is invalid. The facts are substantially and materially different.

Standard Container and Paper Company received 30% of its products from outside the State of Florida; its products were known and intended for distribution in interstate commerce. When such products were shipped by Standard Container, they began their known interstate journey.

In a footnote the appellate court cites *Mitchell vs. Jaffe*, 261 Fed.2d 883 (5th C.A.), in support of its liberalization of construction statement quoted above. But that case merely holds in conformity with general-

ly established principles relating to the Fair Labor Standards Act that when a scrap salvage firm sells to mills (a known and intended use) engaged in production of goods for interstate commerce, the employees of the salvage firm were engaged in production of goods *for* commerce. There is nothing wrong with that holding, but neither is it a liberalization, such as spoken of.

Neither *Standard Container* nor *Jaffe*, supra, lend support to the appellate court's disposition of this case. However, if they do, it amounts, as we have said, to a conflict of decision between the Fifth Court of Appeals and the Supreme Court.

Further, by way of admitting the conflicts and pleading in avoidance, we go back to *Western Union Telegraph Co. vs. Lenroot*, 323 U.S. 490. We have already noted that the Congressional approach to the 1949 amendment was in the light of that decision, which is valid rather than having eroded, as the Fifth Court of Appeals insisted in its expression that "The decisions of this court have adopted a more liberal construction of production than that urged by appellant." In *Western Union Telegraph Co.*, supra, the Court considered the case as though the word "transporting" had been used in the Fair Labor Standards Act back at the time of that decision. We insist that that decision is valid today and squarely in point here. If that decision has in any sense eroded, it certainly was not by reason of the 1949 amendment to the Act, for the Amendment was an adoption by Congress of the principles enunciated therein. We challenge the

plaintiff to point his finger at the very case upon which reliance may be had by the Court of Appeals for any such conclusion.

Words of a statute are construed in the context of the statute where they appear. The context here is in relation to *work* which is in a "closely related process or occupation directly essential" to production of goods *for* commerce.

But this requires no theorizing by ourselves. It is settled by the Supreme Court in *Western Union Telegraph Co. vs. Lenroot*, 323 U.S. 490, 503-504. We feel compelled to quote:

> *"If this construction is adopted, every transporter, transmitter, or mover in interstate commerce is a 'producer' of any goods he carries.* But the statute, while defining 'produced' to mean 'handled' or 'worked on' has not defined 'handled' or 'worked on.' These are terms of ordinary speech and mean what they mean in ordinary intercourse in this context. *They serve a useful purpose when read to relate to all steps, whether manufacture or not, which lead to readiness for putting goods into the stream of commerce.* One who packages a product, or bottles a liquid, or labels, or performs any number of tasks *incidental to preparing for shipment* might otherwise escape the Act, for in a sense he neither manufactures, produces, or mines the goods. We are clear that 'handled' or 'worked on' includes every kind of incidental operation *preparatory to putting goods into the stream of commerce.*
>
> *"If we go beyond this and assume that handling for transit purposes is handling in production, we encounter results which we think Con-*

gress could not have intended. The definitions of this Act apply to the wage and hour provisions, as well as to the child labor provisions. Section 15(a) makes it unlawful to transport or ship goods in the production of which any employee was employed in violation of the wage and hour provisions. But it makes this exception: 'except that no provision of this Act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods *not produced by such common carrier.*' (emphasis by the court). *This recognizes a distinction between handling in transportation and producing, which is entirely put to naught by the Government's contention that by definition everyone who handles goods in carriage is thereby made a producer. The exception then is as if it read 'the Act shall impose no liability on a common carrier for carrying goods that it does not carry.' One would not readily impute such an absurdity to Congress; nor can we assume, contrary to the statute, that 'produced' means one thing in one section and something else in another. To construe those words to mean that handling in carriage or transmission in commerce makes one a producer makes one of these results inevitable. Congress, we think, did not intend to obliterate all distinction between production and transportation.* Its artificial definition, if construed to mean that 'handling' and 'worked on' catches up into the category of production every step in putting the subject of commerce in a state to enter commerce, is a sensible and useful one, not at odds with any other section of the Act. We think the Government has not established its contention that the Western Union is a 'producer' of telegraph messages." (Emphasis supplied).

Lenroot, supra, sustains *Texas Co. vs. Pitman*, 35 S.E.2d 670, 674, where it is said:

> "The words in subsection j immediately above referred to, to wit, 'handling and transportation' has reference only to goods *in process of production* and not to handling and transporting the goods after the production is completed."

That is the only common sense construction the word could have. Theorists too often become the victim of their own mental processes. As we have pointed out herein, what is required is the exercise of a practical judgment.

But it should be entirely unnecessary to present these views and this argument in view of the Fifth Court's strange and complete departure from the plaintiff's theory of the case as clearly set out in plaintiff's pleading herein.

Let us notice, however, in relation to this strange departure from the accepted and usual course of judicial procedures that the appellate court here said that, "Viewed in the light of these decisions, it is clear that the drivers *(in this case)* were engaged in the production of the goods they transported," etc. The trial court found the fact to be to the contrary.

Strange, Strange! For plaintiff, as often said herein, did not even allege that defendant's drivers had anything to do with production of the goods they transported. To the contrary, plaintiff relied wholly and entirely upon the *use* to which the goods were put *after* delivery thereof.

Defendant should, indeed it must, have a trial in which it is accorded all of the elements of a fair trial. These include as minimum: (1) the right to know the misdeeds and wrongs with which it is charged; (2) the right to prepare to defend against the wrongs alleged; (3) a trial according to established principles of justice and usual course of judicial proceedings.

This the Fifth Court of Appeals has denied to the defendant.

X. CONCLUSION

WHEREFORE, petitioner prays that this petition for Writ of Certiorari be granted, and that the judgment below be reversed and judgment rendered.

Respectfully submitted,

CHRISTOPHER, BAILEY
& TAYLOR

T. S. CHRISTOPHER
2412 Continental Life Bldg.
Fort Worth, Texas 76102
Attorney for Petitioner

XI. PROOF OF SERVICE

I, T. S. Christopher, Attorney for Ray Smith Transport Company, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 19 day of September, 1969, I served a copy of the foregoing petition for certiorari to the Supreme Court of the United States on the parties thereto as follows: upon George P. Shultz, Secretary of Labor, United States Department of Labor, Washington, D. C. 20210, by mailing a copy in a duly addressed envelope with air mail postage prepaid, to the Solicitor of Labor and upon Donald S. Shire, Attorney in the office of said Solicitor of Labor; and upon M. J. Parmenter, Regional Attorney, United States Department of Labor, Room 316, 411 North Akard Street, Dallas, Texas 75201.

T. S. Christopher

T. S. CHRISTOPHER

APPENDIX A

W. WILLARD WIRTZ, Secretary of Labor,
United States Department of Labor
v.
RAY SMITH TRANSPORT COMPANY

Civ. A. No. 4645

United States District Court
E. D. Texas,
Tyler Division
January 5, 1968

MEMORANDUM AND ORDER

GARZA, District Judge.

This is a suit by the Secretary of Labor, United States Department of Labor, instituted under Section 17 of the Fair Labor Standards Act of 1938, as amended.

This Court has jurisdiction by virtue of the Act. The Secretary of Labor is seeking an injunction to restrain violations of Sections 7 and 11(c) of the Act, including restraint against further withholding any overtime compensation which the Court may find due Defendant's employees.

The Defendant, Ray Smith Transport Company, is a Texas corporation and maintains a place of business and truck terminal in Tyler, Texas.

During the period in question and regularly, subsequent to July 1, 1964, Defendant has been engaged in business as a specialized motor carrier under a

certificate of authority issued by the Texas Railroad Commission. It has been exclusively engaged in the handling, transportation and delivery of gasoline, kerosene and diesel fuel.

Throughout the period, Defendant has employed approximately seventeen truck drivers for supplying this transportation service within a radius of one hundred miles from the City of Tyler, Texas. These employees were paid on a commission basis, receiving twenty per cent (20%) of the earnings of the trucks they drove. The records reveal that these employees worked from forty to eighty hours per week, and it is undisputed that these employees did not receive any overtime compensation for their hours in excess of forty per week.

The Plaintiff is claiming that Defendant's employees were engaged in the production of goods for commerce, as prescribed by Section 7(a) (1) of the Act and as defined by Section 3(j) of the Act. Therefore, Plaintiff says that the employees are entitled to the overtime compensation as the Act calls for.

Juxtaposed to this, the Defendant says, first, that his employees are not covered by the Act; or, in the alternative, even if the employees are covered, they are subject to one or more of the exemptions provided by Section 13(a) (2) or 13(a) (4) or 13(b) (1) of the Act. Therefore, Defendant says he is not legally obligated to pay any overtime wages either for past, present or future wages.

Both sides have fought vehemently and extensive briefs have been filed after an evidentiary hearing.

The facts in this case are numerous, and effort will be made only to include the pertinent ones.

Not all of the customers or consignee-users of the petroleum products were included in stipulation of facts. A representative sample of fifty-six (56) such customers was taken and a detailed study was made of these.

The record shows that practically all of the transportation service performed by the Defendant has been that of transporting gasoline, kerosene and diesel fuel for Texaco, Inc., the Humble Oil and Refining Company, the Gulf Oil Company, and the Skelly Oil Company.

Almost all of the petroleum products were picked up at the Premier Oil Refinery, Longview, Texas, the La Gloria Oil Refinery, Tyler, Texas, the American Petrofina Refinery, Mt. Pleasant, Texas, the Texaco Oil Pipeline Terminals, Washom and Center, Texas, or the Gulf Oil Corporation Terminal, Big Sandy, Texas. These products were delivered by the Defendant directly to the establishments of the above mentioned four major oil companies, including their bulk stations (wholesale establishments) and their retail service stations, or directly to their customers.

It is stipulated that none of the petroleum products transported by Defendant subsequent to July 1, 1964, have had a prior movement in interstate commerce, where any state line was crossed.

Further, it is stipulated that all these products were delivered within the State of Texas, and no state lines were crossed enroute.

There is also no question but that Defendant's sole purpose and function is that of rendering a transportation service.

The Defendant has no ownership in any of the products he transports. Also, Defendant had nothing to do with the actual production of these goods. His service is strictly one of loading, transporting and delivering these petroleum products.

Mention was made earlier of the fifty-six customers who were chosen as an illustrative sample. These fifty-six were broken down into three groups called (A), (B) and (C).

Category (A) consists of twenty consignees (bus-line companies, truck line companies, and a railway company), and it is stipulated that each of these twenty used the delivered petroleum products as fuel in motor vehicles engaged in the transportation of persons or goods moving to or from places outside the State of Texas.

Category (B) contains twenty-three selected consignees (manufacturing companies, business firms, highway construction companies, crude oil producing company, and others). It is stipulated that each of these consignees "used the fuel in vehicles for transporting their products to customers and places outside of the State of Texas", or in process of manufacturing goods for interstate distribution, or in equipment used in the construction, relocation, or improvement of existing interstate highways, waterways, and a railway.

Category (C) consists of some thirteen customers; for example, the bulk stations or retail service stations owned by Humble, Texaco, Gulf, and Skelly. Defendant's employees regularly made deliveries to these customers. It is stipulated that some unsegregated part of this fuel "was regularly sold and distributed by these bulk stations or their 'retail service stations' for use in trucks and other vehicles engaged in the transportation of goods and persons to and from places outside of the State of Texas."

The Plaintiff rests its case on Defendant's services to these fifty-six customers, and alleges that this activity brings Defendant within the Act.

Defendant admits these acts, but says that such deliveries do not bear the necessary relationship to interstate activities to render the Act applicable, or if the Defendant does come within the Act, the Defendant is relieved by one of the exemptions.

[1] After a searching look at the applicable law and cases, I find that the employees of Defendant are covered by the Act and are entitled to the overtime pay provisions.

In looking at the Act, the statutory definition of "Production" of goods for commerce, 29 U.S.C. § 201 et seq., under subsection 3(j) of the Act, said "Produced" means "produced, manufactured, mined, handled, or in any other manner worked on in any State."

Section 3(j) further states that "For the purpose of this Act an employee shall be deemed to have been engaged in the production of goods if such employee

was employed in producing, manufacturing, mining, *handling, transporting*, or in any other manner working on such goods * * *."

It is this definition which seals the lid on Defendant's liability.

Much of the refined petroleum products that Defendant transported, such as gasoline, kerosene and diesel oil, ended up in interstate commerce. It is admitted that some of this fuel supplied the energy to build, repair, construct interstate highways, waterways and a railway.

The fuel transported by Defendant's employees supplied the power for moving persons, products, etc., through interstate channels.

This transporting of the fuel by Defendant's employees, though entirely intrastate itself, was and is certainly a vital link in the production of goods for commerce.

Without fuel, no goods could be produced, and most assuredly not for commerce, because there could be no transportation between the States.

Also, the transporting of fuel is certainly closely related and directly essential to the production of goods for commerce.

I can think of new functions more vital or necessary to interstate commerce than the supplying of fuel.

The cases most controlling and analoguous appear to be in accord with this view.

The Supreme Court, in Kirschbaum v. Walling, 316

U.S. 517, 62 S.Ct. 1116, 86 L.Ed. 1638, held the Act applicable to employees of an employer who merely rented his building to tenants who produced garments which were sold and distributed outside the State. These employees had nothing directly to do with the production of these goods, nor with the movement of them into interstate commerce. These employees had the sole function of maintaining the building in which these garments were produced. The employees in question were elevator operators, watchmen, porters, carpenters and engineers.

The Supreme Court held that such employees were providing an important of goods for commerce. It said:

> "Without light and heat and power the tenants could not engage * * * in the production of goods for interstate commerce.
>
> "The maintenance of a safe, habitable building is indispensable to that activity."

In that case the employees were providing services important to those involved in interstate commerce.

Likewise in our case here the employees were providing an important service to those involved in interstate commerce.

In our case, the important service is the delivery of the fuel which enables these people to carry on their interstate activities which, as mentioned earlier, were and are numerous.

A case similar to *Kirschbaum* is Schulte Inc. v. Gangi, 328 U.S. 108, 66 S.Ct. 925, 90 L.Ed. 1114. The

Supreme court, dealing with similar facts as in *Kirschbaum*, held that the maintenance employees were covered by the Act.

A third Supreme Court case is Alstate Construction Co. v. Durkin, 345 U.S. 13, 73 S.Ct. 565, 97 L.Ed. 745. In that case, defendant produced a road building material called amesite. This substance was used in building interstate roads, highways, and railways. The Defendant's employees produced this amesite, delivered it to necessary locations and used it in repairing the roads, etc.

The District Court held that all these employees were engaged in the production of goods for commerce, including the employees who did nothing but deliver the material from place to place. (Tobin v. Alstate Const. Co., D.C., 95 F.Supp. 585).

The Circuit Court affirmed, as did the Supreme Court. The Supreme Court said:

> "* * * he who serves interstate highways and railroads serves commerce.
>
> "By the same token, he who produces goods for these indispensable and inseparable parts of commerce produces goods for commerce."

The Defendant's employees in our case serve the interstate highways by transporting the fuel which highway contractors use in their equipment and machinery to build, construct and repair the interstate highways.

The recent case of Wirtz v. Intravaia, 375 F.2d 62 (9 Cir., 1967), cert. den. 389 U.S. 844, 88 S.Ct. 90, 19

L.Ed.2d 110, deserves mention. In this case the defendant's employees did nothing but haul sand, gravel, bulk cement, asphalt and other materials from points of origin to various contractors engaged in building, repairing, etc., of interstate highways, etc. The defendant provided strictly a hauling service; he had nothing to do with the actual producing, use, etc.

The Court held these employee truck drivers were "engaged in the production of goods for commerce" and thus were covered by the Act. The Court said:

> "It follows that it is immaterial that appellees do not in fact produce the commodities that they haul or do any processing of them * * *.
>
> " 'Production of goods for commerce' includes 'transporting' goods for commerce. * * * Under [Section 3(j) of the Act] they (these employees) are deemed to be engaged in the 'production' of such goods [for commerce]."

It should be noted that all the hauling was done within the State and that these goods hauled would never leave the State.

In the case of Wirtz v. English, D.C., 245 F.Supp. 628 (1965), the employees of defendant merely provided the service of hauling away salt water and sediment from local oil wells. Some of this oil from these wells passed out of the State in interstate commerce. The court held that the employees were covered by the Act as they were engaged in a closely related process or occupation directly essential to the production of goods (oil) for commerce.

If this service of hauling away waste is essential

to production of goods for commerce, then surely the transporting in our situation is essential to the production of goods for commerce as defined in the Act.

[2] I find, therefore, that from the applicable law and cases, the transportation of fuels used in interstate transportation, in production of goods for interstate commerce or in the maintenance and improvement of highways, waterways, etc., constitutes the production of goods for commerce within the meaning of the Act.

[3] The Defendant claims as a defense the doctrine of *de minimis*, saying that the quantity and frequency of any work which might be connected with commerce is so negligible as to not come within the Act.

From the stipulation, the Plaintiff is only requesting relief for weeks in which the employees made at least one delivery to one or more of the fifty-six consignee-users which were all engaged in commerce.

The Act, Section 206(b), specifically provides that overtime will be paid during any work week in which the employees are engaged in the production of goods for commerce as defined in Section 203 of the Act.

Also, the case of Mitchell v. Independent Ice & Cold Storage Company, 294 F.2d 186 (5 Cir. 1961), cert. den. 368 U.S. 952, 82 S.Ct. 394, 7 L.Ed.2d 386, held that the *de minimis* rule applies only when deliveries of goods are sporadic and of insubstantial amounts.

The deliveries in our case were made with regularity and involved substantial amounts. That defense, therefore, is without merit.

Defendant also asserts the defenses afforded him under 213(b) (1)[1], and 213(a) (2)-(4)[2].

[1]213(b) (1)—"§ 213. Exemptions

• • • • • •

"(b) The provisions of section 207 of this title shall not apply with respect to—

"(1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 304 of title 49; or • • •"

[2]213(a) (2)-(4)—"§ 213. Exemptions

"(a) The provisions of sections 206 and 207 of this title shall not apply with respect to—

• • • • • •

"(2) any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located, if such establishment—

"(i) is not in an enterprise described in section 203(s) of this title, or

"(ii) is in such an enterprise and is a hotel, motel, restaurant, or motion picture theater; or is an amusement or recreational establishment that operates on a seasonal basis, or

"(iii) is in such an enterprise and is a hospital, or an institution which is primarily engaged in the care of the sick, the aged, the mentally ill or defective, residing on the premises of such institution, or a school for physically or mentally handicapped or gifted children, or

"(iv) is in such an enterprise and has an annual dollar volume of sales (exclusive of excise taxes at the retail level which are separately stated) which is less than $250,000.

"A 'retail or service establishment' shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry; or

"(3) any employee employed by any establishment engaged in laundering, cleaning, or repairing clothing or fabrics, more than 50 per centum of which establishment's annual dollar volume of sales of such services is made within the State in which the establishment is located: *Provided*, That 75 per centum of such establishment's annual dollar volume of sales of such services is made to customers who are not engaged in a mining, manufacturing, transportation, or communications business; or

"(4) any employee employed by an establishment which qualifies as an exempt retail establishment under clause (2) of this subsection and is recognized as a retail establishment in the particular industry not-

[4] As a matter of law, the 213(b) (1) defense is without merit because of Defendant's own stipulation. Defendant admits that no goods transported have had a prior movement in interstate commerce, and that all transporting by Defendant is intrastate.

[5] The 213(a) (2)-(4) defense has some merit and can be argued, but I believe under the cases and applicable law that the Defendant here does not qualify for this exemption. Idaho Sheet Metal Works, Inc. v. Wirtz, Secretary of Labor, 383 U.S. 190, 86 S.Ct. 737, 15 L.Ed.2d 694; Arnold v. Ben Kanowsky, Inc., 361 U.S. 388, 80 S.Ct. 453, 4 L.Ed.2d 393; Wirtz v. Office Communication Co., 244 F.Supp. 994; Wirtz v. English, D.C., 245 F.Supp. 628.

The Plaintiff here requests an injunction to prevent Defendant from further withholdin gany overtime compensation.

Having found that Defendant's employees are covered by the Act, they are entitled to the overtime pay provisions of the Act.

It is ordered that the Defendant will pay these overtime amounts due as charted under the second computation based on a work week scale.

The Defendant in the future will pay overtime wages as prescribed by the Act.

The Plaintiff further seeks an injunction against

---

withstanding that such establishment makes or processes at the retail establishment the goods that it sells: *Provided*, That more than 85 per centum of such establishment's annual dollar volume of sales of goods so made or processed is made within the State in which the establishment is located; or * * *.

Defendant from further withholding any overtime and 11(c) of the Act.

[6] An injunction is an extraordinary process and should not be used without restraint. Our case, I feel, does not call for such a remedy.

[7] The Defendant felt he had a just defense, and he was reasonable in feeling so. The Defendant has maintained adequate work records of his employees, and there is no charge that they are inaccurate. An injunction is not called for and shall not issue.

Counsel for the Plaintiff shall prepare an appropriate judgment for entry after submitting the same to counsel for Defendant for approval.

The Clerk will send copies of this Memorandum and Order to counsel for the parties.

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 26478

W. WILLARD WIRTZ, Secretary of Labor,
United States Department of Labor,
Plaintiff-Appellee,
versus
RAY SMITH TRANSPORT COMPANY,
Defendant-Appellant.

Appeal from the United States District Court for the
Eastern District of Texas

(March 28, 1969)

Before TUTTLE and GEWIN, Circuit Judges, and
PITTMAN, District Judge.

GEWIN, Circuit Judge: The narrow question raised by this appeal is whether truck drivers transporting petroleum products from Texas refineries to points elsewhere in that state are engaged in the *production of goods for commerce*[1] within the meaning of the Fair Labor Standards Act of 1938 as amended.[2] The United

[1] 29 U.S.C. § 206(a) (1964).
[2] 29 U.S.C. §§ 201-219 (1964).

States District Court for the Eastern District of Texas answered in the affirmative and held the drivers covered by the Act.[3] We affirm.

During the period relevant to this suit, the appellant-employer, Ray Smith Transport Company, operated a fleet of specialized motor transportation equipment within the state of Texas. The Secretary seeks by this suit to bring the drivers working out of the appellant's Tyler, Texas office within the coverage of the Act. The drivers regularly engaged in transporting gasoline, kerosene and diesel fuel from the refineries and pipeline terminals of major oil companies to wholesale distributors, retail service stations, and certain commercial and industrial consumers.[4] All deliveries were made within the state.

In determining whether the appellant's drivers engaged in the *production of goods for commerce*, we must deal with two inquiries: (1) whether the drivers engaged in the *production* of the petroleum products they transported; and (2) whether the petroleum products were produced *for commerce*.[5]

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[3] The Secretary of Labor brought this suit in the district court to enjoin the appellant-employer from violating the overtime and record keeping requirements of the Act and to restrain the appellant from continuing to withhold unpaid compensation due under the Act. *See* 29 U.S.C. § 215(a) (2) and (5) (1964). The district court ordered the appellant to pay the overtime amounts sought but refused to enjoin further violations of the Act.

[4] A pre-trial stipulation established a list of fifty-six consignee-users as representative of those to whom the appellant's employees made deliveries. The district court restrained the appellant from withholding payment of overtime compensation due employees for weeks in which the employees made at least one delivery to one or more of these fifty-six consignee-users.

[5] Warren-Bradshaw Drilling Co. v. Hall, 317 U.S. 88, 90 (1942).

The answer to the first of these inquiries lies within the statutory definition of "production" and the cases construing it. Section 3(j) of the Act provides that "an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, *transporting* or in any other manner working on such goods. . . ."[6] The appellant urges that "transporting" has reference merely to the intra-plant and plant-to-plant transporting which takes place before the manufacturing process is completed and that an employee who transports a finished product to market is not engaged in *production*. The appellant relies upon *Western Union Tel. Co. v. Lenroof*[7] in which the Supreme Court rejected a construction of the words "handling" and "working on," as used in section 3(j), which would have them mean not only handling or working on in relation to producing or making an article ready to enter commerce but would also include the handling or working on which accomplishes movement in commerce itself.[8] However, this narrow construction of *production* has not survived in subsequent Supreme Court decisions. In *Thomas v. Hempt Bros.*[9] and *Alstate Constr. Co. v. Durkin*,[10] the Court

[6] 29 U.S.C. § 203(j) (1964) (emphasis added).

[7] 323 U.S. 490 (1945).

[8] *See* Walling v. Comet Carrier, Inc. 151 F.2d 107, 110 (2d Cir. 1945); Baldwin v. Emigrant Indus. Sav. Bank, 150 F.2d 524, 526 (2d Cir. 1945).

[9] 345 U.S. 19 (1953).

[10] 345 U.S. 13 (1953). The Court in *Alstate* makes no specific reference to employees engaged in transporting the surfacing materials, but speaks generally of employees who work away from the construction site in their production. However, Mr. Justice Douglas' dissent, 345 U.S. at 17, and the lower court's opinion, Tobin v. Alstate Constr. Co., 95

held that employees who hauled road surfacing materials from the manufacturer to the road construction site were engaged in *production*. Likewise, the decisions of *this* court have adopted a more liberal construction of *production* than that urged by the appellant.[11] In *Wirtz v. Standard Container & Paper Co.*,[12] we held that drivers who hauled cardboard containers from a supplier's warehouse to manufacturers who used the containers were "transporting" within the meaning of section 3(j) and were, therefore, engaged in *production*. And in *Mitchell v. Jaffe*,[13] we reached a similar result where the employees of a scrap metal dealer received and handled wrecked automobiles and then transported the metal salvaged from them to a manufacturer.[14] Viewed in the light of

F.Supp. 585, 586-87 (M.D. Pa. 1951), make it clear that these delivery employees were included within the scope of the Court's holding. *See* Wirtz v. Intravaia, 375 F.2d 62, 65 (9th Cir.), *cert. denied*, 389 U.S. 844 (1967).

[11]Wirtz v. Standard Container & Paper Co., 389 F.2d 134, 136 (5th Cir. 1967); Wirtz v. Pepsi Cola Bottling Co., 342 F.2d 820 (5th Cir. 1965); Mitchell v. Hooper Equip. Co., 279 F.2d 893, 898-99 (5th Cir. 1960); Mitchell v. Jaffe, 261 F.2d 883, 887-88 (5th Cir. 1958); *see* Wirtz v. Intravaia, 375 F.2d 62, 65-66 (9th Cir.), *cert. denied*, 389 U.S. 844 (1967); Wirtz v. Crystal Lake Crushed Stone Co., 327 F.2d 455, 458-59 (7th Cir. 1964); Wirtz v. Dunmire, 239 F.Supp. 374, 379 (W.D. La., 1965).

[12]389 F.2d 134 (5th Cir. 1967).

[13]261 F.2d 883 (5th Cir. 1958).

[14]The fact that the drivers in the case *sub judice* were not employees of the oil companies but were employees of an independent carrier does not significantly distinguish this case from *Standard Container* and *Jaffe*. "Mere separation of the economic processes of production for commerce between different industrial units, even without any degree of common ownership does not destroy the continuity of production for commerce." D. A. Schulte, Inc. v. Gangi, 328 U.S. 108, 121 (1946); *see* Wirtz v. Intravaia, 375 F.2d 62, 65 (9th Cir.), *cert. denied*, 389 U.S. 844 (1967); Mitchell v. Hooper Equip. Co., 279 F.2d 893, 896-97 (5th Cir. 1960).

these decisions, it is clear that the drivers were engaged in the production of the goods they transported and that the appellant's reliance upon *Western Union* is misplaced.

Next we reach the question of whether the petroleum products delivered by the drivers were produced *for commerce*. The answer depends upon the uses made of the products after delivery. The drivers made most of their deliveries to wholesale oil distributors and retail service stations. An unsegregated portion of the petroleum delivered to these establishments eventually made its way into the fuel tanks of motor vehicles traveling across state lines. Other deliveries, fewer in number, were made to the following consumers: (a) manufacturers who used the petroleum in the manufacture of goods for interstate sale or as fuel in trucks transporting their goods to other states; (b) drilling companies which used the petroleum to drive equipment used in drilling for oil destined to enter interstate commerce;[15] (c) truck and bus lines which used the petroleum as fuel to transport goods and passengers across state lines. We have previously held that the production of electrical energy used in

[15]Also among the fifty-six consignee-users to whom the appellant's employees made deliveries were four companies whose only use of the petroleum was in the manufacture of drilling mud. There is no evidence that the mud was used anywhere but in the Texas oil fields. We express no opinion as to whether the use of the petroleum by these four companies was sufficiently related to interstate commerce to make production of the petroleum used by them production *for commerce*. This reservation of opinion does not disturb the amount due the employees as determined by the district court, see footnote 4, since a careful examination of the work record exhibits reveals that in no relevant workweek were there deliveries exclusively to these four companies.

the manufacture of goods for interstate commerce and for the transportation of goods and persons in interstate commerce is production *for commerce.*[16] Thus we have no difficulty now in concluding that the production of the petroleum products delivered to the above-mentioned recipients is likewise production *for commerce.*

The appellant's drivers also delivered petroleum to construction firms which used it as fuel to run equipment engaged in the construction and maintenance of interstate highways, waterways, and a railroad — avenues of transportation which the courts have characterized as instrumentalities of commerce.[17] Although the petroleum products delivered to these firms were utilized intrastate, the fact that they performed an essential function in the construction and maintenance of instrumentalities of commerce makes inescapable the conclusion that they were produced *for commerce.* This result is dictated by *Alstate*[18] where the Supreme Court declared that production for instrumentalities of commerce is production *for commerce* and held that production of a concrete mixture manufactured in Pennsylvania and used in the construction of interstate roads in Pennsylvania was production *for*

[16]Lewis v. Florida Power & Light Co., 154 F.2d 751, 753 (5th Cir. 1946); *see* Mitchell v. Independent Ice & Cold Storage Co., 294 F.2d 186, 189-90 (5th Cir. 1961); Mitchell v. Mercer Water Co., 208 F.2d 900 (3d Cir. 1953); Meeker Cooperative Light & Power Ass'n v. Phillips, 158, F.2d 698, 699 (8th Cir. 1946); West Ky. Coal Co. v. Walling, 153 F.2d 582, 584 (6th Cir. 1946).

[17]*See* Alstate Constr. Co. v. Durkin, 345 U.S. 13, 16 (1953); Overstreet v. North Shore Corp., 318 U.S. 125, 129-30 (1943).

[18]345 U.S. 13 (1943).

commerce.[19]

The appellant vigorously contends that the remoteness between the activity of its employees and the uses eventually made of the petroleum products precludes a finding that the products were produced *for commerce.* The contention, however, is without merit. If a producer can reasonably expect his product to move or cause movement in interstate commerce, it is immaterial in determining whether the product was produced *for commerce* that this interstate activity is several steps removed from the producer's operation.[20] Although there is no evidence in the record that the appellant actually knew of the relevant uses made of the petroleum, we believe it must be charged with such knowledge because of the type product involved and the nature of the businesses to which it was delivered.[21]

It follows that the drivers were engaged in the production of goods for commerce and are, therefore, covered by the Act. The judgment is AFFIRMED.

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[19]*See* Mitchell v. Vollmer Co., 349 U.S. 427, 430 (1955); Thomas v. Hempt Bros., 345 U.S. 19 (1943); Overstreet v. North Shore Corp., 318 U.S. 125 (1943); Wirtz v. Intravaia, 375 F.2d 62 (9th Cir.); *cert. denied,* 389 U.S. 844 (1967); Wirtz v. Crystal Lake Crushed Stone Co., 327 F.2d 455, 457-58 (7th Cir. 1964); Mitchell v. Hooper Equip. Co., 279 F.2d 893, 895-96 (5th Cir. 1960); Mitchell v. Emala & Assoc., Inc., 274 F.2d 781, 783-84 (4th Cir. 1960).

[20]Warren-Bradshaw Drilling Co. v. Hall, 317 U.S. 88, 92-93 (1942); United States v. Darby, 312 U.S. 100, 118 (1941); *see* Bracey v. Luray, 138 F.2d 8, 11 (4th Cir. 1943).

[21]*See* Wirtz v. Crystal Lake Crushed Stone Co., 327 F.2d 455, 458 (7th Cir. 1964); Mitchell v. Jaffe, 261 F.2d 883, 887-88 (5th Cir. 1958); Mitchell v. Raines, 238 F.2d 186, 188 (5th Cir. 1956); Tobin v. Celery City Printing Co., 197 F.2d 228, 229 (5th Cir. 1952); St. John v. Brown, 38 F.Supp. 385, 388-89 (N.D. Tex. 1941).

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 26478

W. WILLARD WIRTZ, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
Plaintiff-Appellee,

versus

RAY SMITH TRANSPORT COMPANY,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Texas

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(July 15, 1969)

Before TUTTLE and GEWIN, Circuit Judges, and PITTMAN, District Judge.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 624

RAY SMITH TRANSPORT COMPANY, PETITIONER

v.

GEORGE P. SHULTZ, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 409 F. 2d 954. The opinion of the district court (Pet. App. A) is reported at 280 F. Supp. 54.

JURISDICTION

The judgment of the court of appeals was entered on March 28, 1969. A petition for rehearing and a motion for rehearing *en banc* were denied on July 15, 1969. The petition for a writ of certiorari was filed on September 22, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

366-751—69

QUESTION PRESENTED

Whether employees engaged in the intrastate transportation of petroleum products for use by instrumentalities of interstate transportation and manufacturers of goods for interstate commerce are engaged "in the production of goods for commerce" within the meaning of the Fair Labor Standards Act.

STATUTE INVOLVED

Section 3(j) of the Fair Labor Standards Act of 1938, 52 Stat. 1060, 1061, as amended, 29 U.S.C. 203(j), provides:

> "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State.

STATEMENT

The Secretary of Labor brought this action under Section 17 of the Fair Labor Standards Act (29 U.S.C. 217) to restrain petitioner from violating the overtime and record keeping provisions of the Act, and from continuing to withhold payment of overtime compensation due certain employees under the Act. Petitioner admitted its noncompliance with the Act, but claimed, *inter alia,* that its employees were not covered by the Act since they were not engaged

"in the production of goods for commerce" as alleged by the Secretary.

Petitioner, a Texas corporation, is a motor carrier engaged in transporting gasoline, kerosene, and diesel fuel under a certificate of convenience and necessity issued by the Texas Railroad Commission (R. 81, 94). Substantially all of petitioner's business during the pertinent period consisted of transporting such petroleum products from Texas refineries and pipeline terminals either to the bulk stations, truck stops, and retail service stations of various major oil companies, or directly to their customers, all of which were located in the State of Texas (R. 93–94, 104–105).

The evidence included a stipulated list of 56 consignee-users, divided into three categories, as representative of those to which petitioner's employees made deliveries for the oil companies (R. 76, at 81–86; 104, 105–107). Category (a) consists of 20 transportation companies, including bus lines, truck lines, and railroads (R. 82–83); it was stipulated that each of them used the petroleum products as fuel in motor vehicles engaged in the interstate transportation of persons or goods (R. 86). Category (b) consists of 23 industrial or commercial users, including manufacturing companies and firms engaged in constructing highways, dams, and reservoirs (R. 83–92); the petroleum products delivered to these consignees were used in motor vehicles transporting goods out of state, in manufacturing goods or in drilling for petroleum for interstate distribution, and in operating equipment used in the construction or improvement of interstate

highways, waterways, and a railroad bed (R. 86–92). Category (c) consists of 13 establishments, including bulk stations, truck stops, and retail service stations (R. 85–86, 224); it was stipulated that an unsegregated portion of the fuel delivered to these consignees was regularly sold and distributed to motor vehicles engaged in the interstate transportation of persons and goods (R. 92–93). Most of petitioner's deliveries were to consignees in category (c) (R. 343).

Petitioner employed 17 truck drivers during the pertinent period (R. 81–82), and they worked from 40 to 80 hours a week (R. 103). Petitioner did not pay these employees the statutory premium for work in excess of 40 hours in any workweek (R. 103, 351).

The district court held that the drivers were covered by the Act, since "the transportation of fuels used in interstate transportation, in production of goods for interstate commerce or in the maintenance and improvement of highways, waterways, etc., constitutes the production of goods for commerce within the meaning of the Act" (Pet. App. A, 37, 42). Accordingly, the court restrained the continued withholding of a total of $28,940 due to 17 employees by virtue of petitioner's violations (R. 120–121). The court of appeals affirmed, concluding that in the light of the decisions of this Court and numerous courts of appeals, the drivers were clearly engaged in the "production" of the goods they transported, and such production was "for commerce" (Pet. App. B, 48–52).

ARGUMENT

The decision below correctly applies the governing principles established by the decisions of this Court and is not in conflict with the decisions of other courts of appeals.

The Act's definition of "production" (Section 3(j)) includes not only the "manufacturing" and "mining" of goods, but also "handling, transporting, or in any other manner working on such goods," as well as engaging in "any closely related process or occupation directly essential" to the production of such goods. That the transportation of petroleum products by petitioner's employees is squarely within this definition of production of goods has been settled by this Court's decisions in *Alstate Construction Co.* v. *Durkin*, 345 U.S. 13, and *Thomas* v. *Hempt Bros.*, 345 U.S. 19, and is supported by numerous decisions of the courts of appeals, cited *infra*.[1] It is also well settled that goods produced "for commerce" include not only articles produced for interstate shipment, as petitioner contends, but also commodities which are used within the state in constructing or maintaining instrumentalities of interstate commerce (*Alstate Construction Co.* v. *Durkin, supra*), or which are consumed in the process of furthering interstate transportation (*Mitchell* v. *Independent Ice & Cold Storage Co.*, 294

[1] See also *National Labor Relations Board* v. *Sererette*, 377 U.S. 46, 55, where this Court, relying on the Fair Labor Standards Act cases, held that a distributor of food products was a "producer" within the meaning of the National Labor Relations Act—thereby rejecting the argument made here that the word "producer" is limited to those "directly involved in the physical process by creating the products."

F. 2d 186 (C.A. 5), certiorari denied, 368 U.S. 952; *Atlantic Co.* v. *Walling*, 131 F. 2d 518 (C.A. 5)).

Thus, in *Alstate Construction Co., supra*, this Court, noting that "interstate roads and railroads are indispensable 'instrumentalities' in the carriage of persons and goods that move in interstate commerce," held that "he who produces goods for these indispensable and inseparable parts of commerce produces goods for commerce" (345 U.S. at 16). This rationale, which has been applied in numerous other decisions, fully supports the decision below that the Act covers petitioner's employees who deliver products to construction companies for use in the maintenance and improvement of roads and other instrumentalities of commerce (see R. 88–91).[2] See *Mitchell* v. *Hooper Equipment Co.*, 279 F. 2d 893 (C.A. 5); *Wirtz* v. *Intravaia*, 375 F. 2d 62 (C.A. 9), certiorari denied, 389 U.S. 844; *Wirtz* v. *Crystal Lake Crushed Stone Co.*, 327 F. 2d 455 (C.A. 7); *Mitchell* v. *Emala & Associates, Inc.*, 274 F. 2d 781 (C.A. 4); *Emulsified Asphalt Products Co.* v. *Mitchell*, 222 F. 2d 913 (C.A. 6).

The foregoing decisions also establish that the Act covers fuel deliveries by petitioner's employees to the various transportation companies and manufacturing companies, and to bulk stations, truck stops, and

[2] Although this Court's opinion in *Alstate* did not specifically refer to employees engaged in transporting the materials, but referred generally to the employer's "off-the-road" employees, it is clear from Mr. Justice Douglas' dissenting opinion, 345 U.S. at 17, and the district court's opinion, *Tobin* v. *Alstate Const. Co.*, 95 F. Supp. 585, 586–587 (M.D. Pa.), that among these employees were truck drivers hauling the materials from the plant to the job sites.

retail service stations (described at R. 82–86, 91–92) for use in the transportation of persons and goods in interstate commerce. As this Court stated in *Mitchell* v. *H. B. Zachry Co.*, 362 U.S. 310, 316, the Act applies to employment in the production of a commodity which "is to be consumed primarily by commerce in the statutory sense, by its 'facilities and instrumentalities.'" And it has frequently been held that the furnishing of ice for the refrigeration of goods during interstate transit and the furnishing of electricity for interstate transportation and communication are within the meaning of production for commerce under Section 3(j). See *Mitchell* v. *Independent Ice & Cold Storage Company*, 294 F. 2d 186 (C.A. 5), certiorari denied, 368 U.S. 952; *Hamlet Ice Co.* v. *Fleming*, 127 F. 2d 165 (C.A. 4), certiorari denied, 317 U.S. 634; *Chapman* v. *Home Ice Co. of Memphis*, 136 F. 2d 353 (C.A. 6), certiorari denied, 320 U.S. 761; *Lewis* v. *Florida Power & Light Co.*, 154 F. 2d 751 (C.A. 5). As the Fifth Circuit held in *Atlantic Co.* v. *Walling*, 131 F. 2d 518, 520–521, "commerce" embraces not only "goods traded in interstate commerce," but also the "carriers engaged in interstate commerce, and the instrumentalities by which such commerce is carried on," and, accordingly, commodities which are consumed by such instrumentalities in interstate transportation are produced "for commerce."

The Act's coverage of deliveries of fuel to interstate producers[3] for use in their manufacturing oper-

[3] Included in this category are the deliveries to the Lone Star Steel Co. (R. 86–87), the Red River Army Depot (R. 87–88), and the three drilling companies described at R. 92.

ations is likewise supported by a consistent line of decisions holding that the furnishing of gas, water, electricity, coal or other commodities to a producer of goods for commerce is "closely related" and "directly essential" to the production of those goods, and is therefore within the meaning of "production of goods for commerce." See, *e.g.*, *Wirtz* v. *F. M. Sloan, Inc.*, 411 F. 2d 56 (C.A. 3); *Mitchell* v. *Mercer Water Co.*, 208 F. 2d 900 (C.A. 3); *Meeker Cooperative Light & Power Ass'n* v. *Phillips*, 158 F. 2d 698 (C.A. 8); *West Kentucky Coal Co.* v. *Walling*, 153 F. 2d 582 (C.A. 6); *Reynolds* v. *Salt River Valley Water Users Ass'n*, 143 F. 2d 863 (C.A. 9); *Wirtz* v. *Idaho Sheet Metal Works, Inc.*, 335 F. 2d 952 (C.A. 9), affirmed, 383 U.S. 190; *Mitchell* v. *Independent Ice & Cold Storage Company*, 294 F. 2d 186 (C.A. 5); *Walling* v. *Amidon*, 153 F. 2d 159 (C.A. 10).[4]

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[4] The statutory language upon which coverage is based in such cases is found in Section 3(j) of the Act, which, as originally enacted in 1938, provided that "for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in * * * *any process or occupation necessary to the production thereof*, in any State" (emphasis added). An amendment to the Act in 1949 substituted for the italicized language the phrase "any closely related process or occupation directly essential to the production thereof." 63 Stat. 910, 911. While some of the foregoing decisions antedate this amendment, its legislative history is explicit that the types of activities involved in such cases were intended to remain covered under the amended language. Report of Majority of Senate Conferees, 95 Cong. Rec. 14874–14875; H. Rep. No. 1453, 81st Cong., 1st Sess., 95 Cong. Rec. 14928–14929. The decisions subsequent to the amendment reflect the continuing vitality of this line of cases. *Wirtz* v. *F. M. Sloan, Inc.*, *supra*; *Mitchell* v. *Independent Ice & Cold Storage Company*, *supra*; *Mitchell* v. *Mercer Water Co.*, *supra*.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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